IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20..07..2006

CORAM

THE HON'BLE MR. A.P.SHAH, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE D.MURUGESAN

Writ Appeal No.881 of 2006

1. D.Senthil Kumar
2. C.P.Senthil
3. C.P.Sakthivel ..Appellants.

Vs.

1. The Commercial Tax Officer,
   Brough Road, Erode,
   Erode District.

2. The Sub Registrar,
   No.1, Karungalpalayam,
   Erode. ..Respondents.

PRAYER: Writ Appeal under Clause 15 of the Letters Patent against the order of a learned single Judge of this Court dated 17.06.2006 passed in W.P.No.11900 of 2006.

For Appellants :: Mr.M.M.Sundaresh

For Respondents :: Mr.Haja Nazirudeen,
Spl. Govt. Pleader (Taxes)

J U D G M E N T

(Judgment of the Court was delivered by The Hon'ble The Chief Justice)

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Admit. The learned Special Government Pleader appearing for the respondents waives service. By consent, the appeal is taken up for hearing.

2. In this appeal filed against the order of a learned single Judge passed in a writ petition under Article 226 of the Constitution of India, the question relates to the liability of an

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auction purchaser of a property at a public auction towards the arrears of sales tax due under the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as the 'TNGST Act'), which dues are a statutory charge on the property sold, and of which the purchaser had no actual notice. By the order under appeal, the learned single Judge held that the issue is covered by the judgment of a Division Bench of this Court in the case of N.Padma Coffee Works & Others Vs. Commercial Tax Officer, Rock Fort Assessment Circle, Trichy reported in (1999) 114 S.T.C. 494 and the contention that the appellants are bona fide purchasers has to be established only before a civil court by adducing proper evidence and not in a writ petition filed under Article 226 of the Constitution.

3. The property, which is the subject matter of controversy, has been purchased by the appellants, for a sum of Rs.23,50,000/- pursuant to the sale held by public auction conducted on 10.03.2003. The sale under auction had been conducted in execution of Recovery Certificate Nos.47 of 2001 and 93 of 2001 dated 05.02.2001 and 30.04.2001 respectively in terms of the order passed by the Debts Recovery Tribunal in O.A.Nos.356 of 2000 and 848 of 2000 respectively dated 06.12.2000 for the purpose of recovery of the debts due to the City Union Bank, Erode from M/s.New Fashion Parks and two others.

4. The entire amount had been paid by the appellants on 25.03.2003 and the sale was confirmed on 23.04.2003, as there was no application from any statutory or public authority seeking to set aside the sale. A Sale Certificate has also been issued on 08.07.2003, followed by a letter from the Recovery Officer addressed to the Sub Registrar, Erode, the second respondent herein, requesting him to make the necessary entries in the register maintained by the second respondent. On payment of adequate stamp duty, the entry of the Sale Certificate has been registered by the second respondent and the Encumbrance Certificate has been issued, showing the appellant as the absolute owners of the property.

5. It appears that the property belonged to one S.K.Veerappa Chettiar & Company and others and since the said Company was in arrears of sales tax under the TNGST Act, by letter dated 25.06.2004, the Commercial Tax Officer, Erode, the first respondent herein, required the second respondent herein to create an encumbrance with regard to the property and an entry was made in the register in respect of the encumbrance of the first respondent. Immediately on coming to know about the encumbrance created, a legal notice had been sent on 04.04.2006 by the appellants to the first respondent, but however, no action was taken to rectify the mistake. Since the respondents were not willing to relent, the appellants moved Writ Petition No.11900 of 2006 seeking to issue a writ of certiorarified mandamus to quash the proceedings of the first respondent in Na.Ka.No.1707/2000/A3 dated 25.06.2004 and to direct the respondents to remove the encumbrance of sales tax dues

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entered in respect of the appellants' property. The writ petition was dismissed in limine by the learned single Judge holding that the appellants will have to prove that they were bona fide purchasers of the property in a civil suit.

6. Mr.M.M.Sundaresh, learned counsel appearing for the appellants strenuously contended that the appellants are bona fide purchasers of the property for valuable consideration without notice and hence, their property cannot be encumbered. He submitted that no encumbrance could be created in view of the fact that the property has already been transferred in favour of the appellants and hence, the question of creating any encumbrance in respect of the same does not arise. Learned counsel further submitted that under Section 100 of the Transfer of Property Act, 1882, a charge cannot bind a bona fide purchaser for valuable consideration without notice and in the absence of any provision requiring to dispense with such notice under the TNGST Act, it would not be permissible for the Sales Tax authorities to proceed against the transferee who has purchased the property for valuable consideration without notice.

7. In reply, the learned Special Government Pleader appearing for the Department submitted that since a charge over the property of the defaulting firm had been created under the TNGST Act, the appellants, as the transferees of the said property, hold the property subject to that charge. In the alternative, the learned Special Government Pleader submitted that the Act creates a first charge on the property of the dealer or any other person for any amount of tax, penalty, interest, or other sum payable by a dealer or the other person under the Act, clearly giving priority to the statutory charge over all other charges on the property, including a mortgage and hence, the claim of the Sales Tax Department that their dues be paid from out of the proceeds of the sale of the property took priority over the claim of the Bank as a mortgagee of the property in question and therefore, the Department should be allowed to recover the amount due from the City Union Bank.

8. The short question is whether the charge created on a property under the TNGST Act is enforceable against a transferee of such property. The expression 'charge' is not defined by the TNGST Act. However, this concept is well known in law of transfer of property and has been defined by Section 100 of the Transfer of Property Act, wherein the word 'charge' is defined as follows:

> "Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simply mortgage shall, so far as may be, apply to such charge.
>
> Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as

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otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge." (emphasis supplied)

As the Section itself indicates, a charge may not be enforced against a transferee if he/she has had notice of the same, unless by law, the requirement of such notice had been waived.

9. The provisions of Section 100 of the Transfer of Property Act fell for consideration of the Supreme Court in Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdul Gafur Haji Hussenbhai, (1971) 1 SCC 757. In that case, the respondent was in arrears of property tax, due under the Bombay Provincial Municipal Corporation Act, 1949. Consequently, the Municipal Corporation created a charge over the property of the defaulter. However, the property was sold in execution of a mortgage decree. When the Municipal Corporation purported to exercise their charge over the property, the purchaser in court-auction filed a suit for a declaration that he was the owner of the property and that the arrears of municipal taxes due by the transferor were not recoverable from him by proceeding against the property purchased in the auction. In the appeal before the Supreme Court, the Municipal Corporation's main argument was that where the local law provided for the creation of a charge against a property for which municipal taxes were due, transferees of such properties were imputed with constructive knowledge of any charge created against the properties that they had purchased. This argument was, however, rejected. The Court held that while constructive notice was sufficient to satisfy the notice in the proviso to Section 100 of the Transfer of Property Act, whether the transferee had constructive notice of the charge had to be determined on the facts and circumstances of the case. In other words, the Supreme Court held that there could be no fixed presumption as to the transferee having constructive notice of the charge against the property.

10. The principle laid down in Ahmedabad Municipal Corporation's case has been applied in a sales tax case arising under the Karnataka Sales Tax Act, 1957 in State of Karnataka Vs. Shreyas Papers (P) Ltd., (2006) 1 SCC 615. There, following the decision in Ahmedabad Municipal Corporation's case, the Supreme Court held as follows:

"22. In the present case, firstly, no provision of law has been cited before us that exempts the requirement of notice of the charge for its enforcement against a transferee who had no notice of the same. It remains to be seen, therefore, if in the facts of the present case, the first respondent had notice-actual or constructive of the charge. At the outset, in the advertisement/notice dated 17.03.1992 issued by the Corporation, mention is only made of the sale of the defaulting company's assets and there is no indication, whatsoever, of any sales tax arrears. Further, the bid offer

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made on behalf of the first respondent on 05.06.1992 specifically excludes any statutory liabilities, including sales tax. This offer was accepted by the Corporation on 15.07.1992. Even at that stage, there was no mention of any sales tax arrears. The sale of the assets took place pursuant to the agreement dated 12.08.1992 in which a specific clause was inserted that the first respondent would be liable to pay all property taxes, other taxes, electricity bills, water taxes and rents from the date of the agreement (i.e., 12.08.1992). For the first time, by letter dated 08.01.1993 of the second appellant to the Mandal Panchayat, Aloor Taluk, the issue of sales tax dues of the defaulting company was brought to the surface. This is further borne out by the correspondence between the first respondent and the Corporation. Thus, it is evident that the first respondent had no actual notice of the charge prior to the transfer. As to whether the first respondent had constructive notice of the charge, no substantive argument on this issue was made, either before the High Court or at any rate before us. Hence, we cannot hold that the first respondent had constructive notice of the charge.

23. In these circumstances, we are of the view that the first respondent was a purchaser for value without notice of the sales tax arrears of the defaulting company or the consequent charge on the property. This would, therefore, attract the principle laid down by this Court in Ahmedabad Municipal Corporation's case (supra) which is also embodied in the proviso to Section 100 of the T.P.Act. Thus, the property in the hands of the first respondent was free of the charge and it is not open to the appellants to enforce the liabilities of the defaulting company in this manner against the first respondent."

11. In Shreyas Paper's case, the Supreme Court also referred to the decision of a Division Bench of this Court in C.T.O. Vs. R.K. Steels, (1998) 108 S.T.C. 161 (Madras), where this very question arose under Section 24 of the TNGST Act. In that case, the assessee firm was in arrears of tax from the Assessment Years 1976-77 to 1979-80. The assessee firm was closed on 19.10.1979. Thereafter, the land belonging to the firm was sold by one of the partners of the firm on 30.12.1981. The purchaser had no notice of the charge over the property by virtue of sales tax dues. The purchaser challenged the Form - 7 notice issued under the Tamil Nadu Revenue Recovery Tax on the ground that he is a bona fide purchaser without notice of charge under the TNGST Act. The Division Bench held that no provision is made in the TNGST Act contrary to Section 100 of the Transfer of Property Act and therefore, a bona fide purchaser for consideration without notice is protected.

12. In the instant case, the property was sold by public auction on 10.03.2003. The sale was conducted in execution of the

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Recovery Certificates issued by the Debts Recovery Tribunal for recovery of dues to the City Union Bank. The appellants had paid the entire amount due on 25.03.2003 and the sale was confirmed in their favour on 23.04.2003. There is no indication of any sales tax arrears in the advertisement for auction sale and there was no application from any statutory or public authority seeking to set aside the sale. For the first time, by letter dated 25.06.2004 the Commercial Officer required the second respondent to create an encumbrance with regard to the property and consequently an entry was made in the register in respect of encumbrance of the first respondent. Thus, it is evident that the appellants had no actual notice of the charge prior to the transfer. There is also no material to show that the appellants had constructive notice of the charge and no submissions were made by the learned Special Government Pleader on this issue. In the circumstances, we are of the view that the appellants were the purchasers for value without notice for the sales tax arrears of the defaulting company or the consequent charge on the property. Thus, the property in the hands of the appellants was free of the charge and it is not open to the first respondent to enforce the liabilities of the defaulting company in this manner against the appellants.

13. Insofar as the alternative submission of the learned Special Government Pleader that the charge created under Section 23 of the TNGST Act will have priority over the mortgage created in favour of the City Union Bank, it is not necessary for us to express any opinion thereon in the present case, since the bank is not a party to the present proceedings. The first respondent is entitled to adopt such proceedings as permissible in law to establish its rights against the bank.

14. In the circumstances, the appellants herein, as transferees of the property for valuable consideration without notice of the charge, are entitled for protection and consequently, the proceedings of the first respondent in Na.Ka.No.1707/2000/A3 dated 25.06.2004 are liable to be set aside and are accordingly set aside. The writ appeal is accordingly allowed. No costs. Consequently, W.A.M.P.No.1 of 2006 is closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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Copy to:-

1. The Commercial Tax Officer,
   Brough Road, Erode, Erode District.

2. The Sub Registrar,
   No.1, Karungalpalayam, Erode.

1 cc to Special Govt. Pleader, sr. 32183
1 cc to Mr.M.M.Sundaresh, Advocate, Sr. 32098

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